

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of

Petition of the Embarq Local
Operating Companies for Limited
Forbearance Under 47 U.S.C. §
160(c) from Enforcement of Rule
69.5(a), 47 U.S.C.
§251(b), and Commission Orders on
the ESP Exemption.

WC Docket No. 08-8

**COMMENTS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION
AND THE PEOPLE OF THE STATE OF CALIFORNIA**

LIONEL B. WILSON
HELEN M. MICKIEWICZ
CHRISTOPHER P. WITTEMAN

Attorneys for the People
Of The State Of California And The
California Public Utilities Commission

March 14, 2008

California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Phone: (415) 355-5524
Fax: (415) 703-4465
Email: wit@cpuc.ca.gov

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of

Petition of the Embarq Local
Operating Companies for Limited
Forbearance Under 47 U.S.C. §
160(c) from Enforcement of Rule
69.5(a), 47 U.S.C. § 251(b), and
Commission Orders on the ESP
Exemption.

WC Docket No. 08-8

**COMMENTS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION
AND THE PEOPLE OF THE STATE OF CALIFORNIA**

I. INTRODUCTION

The California Public Utilities Commission and the People of the State of California (CPUC or California), submit these reply comments in response to comments filed by various parties on February 19, 2008 in the above-captioned matter, the Petition¹ of the Embarq Local Operating Companies for Forbearance (Embarq, Petition).² Embarq's January 11, 2008, Petition sought

¹ Petition of the Embarq Local Operating Companies for Limited Forbearance Under 47 U.S.C. §160© from Enforcement of Rule 69.5(a), 47 U.S.C. §251 (b), and Commission Orders on the ESP Exemption at 17 (filed Jan. 11, 2008) (Petition)

² The February filing date for Opening Comments on the Embarq Petition was February 19, 2008. Because of short notice, and the Commission meeting schedule, it was not practically possible to obtain Commission authority to comment in time to permit filing of Opening Comments. The CPUC's comments are therefore formally and substantively comments in reply to the opening comments filed by other parties on February 19. The CPUC does not

to ensure that carriers whose Internet protocol (IP) calls terminate on the public switched telephone network (PSTN) pay some compensation for that terminating access, and not be allowed to “misuse” the so-called “ESP exemption” to avoid paying such compensation. Specifically, Embarq asks the Commission to forbear from any application or enforcement of the ESP exemption to IP-to-PSTN voice traffic.³ Embarq notes in its Petition that it faces:

...a growing number of disputes about the appropriate compensation for terminating non-local calls routed to the public switched telephone network (“PSTN”) that originated in Internet Protocol (“IP”). Increasingly, some carriers are claiming that their IP-to-PSTN voice calls are exempt from access charges because of a regulation that the Commission created in the 1980s for enhanced service providers (“ESPs”). These carriers are claiming preferential treatment for IP-to-PSTN traffic by pretending that the ESP exemption prohibits local exchange carriers (“LECs”) like Embarq from recovery [of] ordinary compensation for terminating calls on the PSTN, simply because those calls originated with a service provider that uses IP technology.⁴

As such, Embarq’s position describes the situation addressed by the CPUC in its Decision 07-01-004:

[The Global NAPs’] response misreads applicable law. The only relevant exemption from the access charge regime under Federal law is for *ISP-bound traffic*

formally address the companion and opposing *Petition of Feature Group IP for Forbearance*, WC Docket No. 07-257 although, as many parties have noted, the issues in the two proceedings are largely identical. Petitioners in both dockets address themselves to the issue of whether IP-PSTN traffic comes within the “ESP exemption.”

³ Petition at 1.

⁴ Petition Summary at .i.

rather than *ISP-originated* traffic...⁵

In its Decision 07-01-004, the CPUC concluded that telephone traffic flowing *onto* the PSTN, even if it originated from a Voice over Internet Protocol (VoIP) or other enhanced service provider may be subject to compensation for terminating access. In so deciding, the CPUC relied first and primarily on the specific language of the interconnection agreement (ICA) between Global NAPs and Cox that was at issue in that case and secondarily on the policy statement of the Federal Communications Commission (FCC or Commission) in the *IP*

Enabled Services docket:

As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, **irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network.** We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.⁶

A decision in the *IP Enabled Services* docket, as in the *Intercarrier*

⁵ D.07-01-004, in *Cox California Telecom v. Global NAPs California*, CPUC docket C.06-04-026; Slip Op. at 5. Decision 07-01-004, and numerous other documents in this docket, can be viewed at <http://docs.cpuc.ca.gov/published/proceedings/C0604026.htm>. The extensive appellate history of this case is cited in the following footnote.

⁶ *In the Matter of IP-Enabled Services* Notice of Proposed Rulemaking, WC Docket 04-36 (March 10, 2004), ¶¶ 33, 61, quoted in D.07-01-004, Slip Op. at 5. (Emphasis added.) *Global NAPs* has also argued that the FCC has exclusive jurisdiction to rule on any matter relating to ESP originated traffic, even in the context of a State agency resolution of intercarrier compensation issues pursuant to 47 U.S.C. § 252. This argument was rejected by the CPUC, and viewed with disfavor by both the State and Federal appellate courts to which Global NAPs has addressed its claims. D.07-01-004, at 4; *Global NAPs California Inc. v. Public Utilities Commission of the State of California*, U.S. Dist. Court for the Central District of California, CV-07-04801 MMM (SSx), August 28, 2007 Order Denying Injunction (available on PACER); multiple orders of the California Court of Appeal, Second District, and California Supreme Court, summarily denying various Petitions for Writ of Review, all *sub nom. Global NAPs California, Inc. v. Public Utilities Commission of the State of California*, available at <http://appellatecases.courtinfo.ca.gov/>.

Compensation docket,⁷ remains outstanding.

II. CPUC COMMENTS

The CPUC reads Embarq's Petition as essentially requesting a declaratory affirmation of the FCC's previous pronouncements on IP to PSTN traffic, as well as a declaration that the "ESP exemption" was never intended to apply to such traffic. As a procedural matter, then, the CPUC shares the concerns of commenters who questioned the appropriateness of a forbearance petition to obtain such a declaration of policy.⁸ Thus, the CPUC takes no position on Embarq's Petition for Limited Forbearance *per se*, and addresses itself rather to the substantive policy questions addressed therein, and the impact of these unresolved policy questions on the Commission's ability to carry out its dispute resolution obligations under 47 U.S.C. § 252.

The CPUC supports Embarq's position to the extent that it is consistent with the general principle enunciated by the FCC in its *IP Enabled Services* docket, i.e., that those who use the public telephone network should share equitably in its

⁷ *In the Matter of Developing a Unified Inter-carrier Compensation Regime*, CC Docket No. 01-92.

⁸ It is unclear why Embarq styles its Petition as one for forbearance rather than for declaratory relief under 47 CFR ¶ 1.2. *See generally* March 7, 2008 Comments of the CPUC in *Petition of Verizon for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain of the Commission's Recordkeeping and Reporting Requirements*, expressing concern about the over-use and potential misuse of the forbearance procedures in the 1996 Telecommunications Act; *see also* Comments of Texatel, at 7 ("Forbearance has become the loophole *du jour* of the incumbent LECs"); Comments of Verizon, at 11 (it is "contrary to the public interest for the Commission to address intercarrier compensation for VoIP traffic through forbearance"); Comments of CommPartners in Opposition to Petition for Forbearance (Embarq's "Petition asks the Commission to forbear from applying a regulation that Embarq claims does not really exist").

costs.⁹ The CPUC also joins those commenters who agree with Embarq that the “ESP exemption” was originally intended as a narrowly drawn exception to the rule of terminating access compensation, and was addressed specifically to traffic travelling *from* the PSTN to the IP world, and not the other way around.¹⁰

The CPUC, however, takes no position in this docket as to what level of compensation is reasonable, fair, and equitable for IP to PSTN terminating access. Indeed, California shares the concerns of some commenting parties that an unfair intercarrier compensation regime could stifle innovation,¹¹ and urges the FCC to resolve outstanding issues that have been addressed elsewhere pertaining to the FCC’s historic intercarrier compensation scheme.

III. RECOMMENDATION

The CPUC believes that more FCC clarity on interconnection issues, generally, would assist the Commission in carrying out its duties relating to the approval, arbitration and enforcement of interconnection agreements under 47 U.S.C. § 252. As such, the CPUC agrees with the observation of many commenters that the root cause of the competing Petitions for Forbearance (*Embarq* and

⁹ Perhaps predictably, this view drew the strongest support from the incumbent carriers’ comments. *See, e.g.*, Comments of TDS Telecommunications Corp., at 1, *passim*; Comments of AT&T, at 1, *passim*; Comments of D&E Communications, at 1, *passim*; Comments of Montana Telecommunications Association, at 2-3, *passim*.

¹⁰ *See, e.g.*, Comments of Verizon, at 12, fn. 30 (although opposing Embarq’s Petition *per se*, Verizon notes that “Embarq ... is correct insofar as it explains the ESP exemption is a narrowly-crafted policy designed to apply in one particular circumstance – where ESPs obtain access to the local exchange in order to sell their services to PSTN customers – that bears no resemblance to VoIP communications”).

¹¹ *See, e.g.*, Comments of Google, Inc., at 1, *passim*; *see also* Comments of the Open Internet Coalition, at 1, *passim*.

Feature Group IP) is the lack of a decision in the Commission's *Intercarrier Compensation* docket(s).¹² As Global Crossing notes in its Comments, "virtually the entire industry is engaged in some form of dispute resolution or litigation around inter-carrier compensation."¹³

The CPUC has itself devoted significant resources to the resolution of such litigation.¹⁴ While the CPUC is willing to accept its dispute resolution role in the system of "cooperative Federalism" created by the 1996 Telecommunications Act,¹⁵ like many state agencies it must either "wait for Godot," i.e., wait for the FCC to clearly define the rules for intercarrier compensation, or wade into the middle of

¹² See, e.g., Comments of Qwest, at 19-20.

¹³ Comments of Global Crossing North America, at 2. Global Crossing also asserts that the United States is "unique among nations ... the only country that differentiates traffic types for purposes of intercarrier compensation." *Id.* Global Crossing's implicit suggestion that other countries might provide useful models and impetus to resolve the current interconnection stalemate is perhaps a useful one. See, e.g., http://ec.europa.eu/information_society/policy/ecomm/todays_framework/overview/index_en.htm (overview of European Union framework for electronic communications, including its Access and Interconnection Directive); See also http://www.bundesnetzagentur.de/enid/532e61b9bba5d90dfada0d9110d534ae.0/Telecoms_Regulation/IP_interconnection_1zm.html (report of the German Federal Network Agency on "Framework Conditions for the Interconnection of IP Based Networks"), and <http://www.bundesnetzagentur.de/media/archive/6201.pdf> (Network Agency's report on "Interconnection Regimes in the USA and UK").

¹⁴ The CPUC has interpreted, arbitrated, resolved and enforced numerous intercarrier compensation disputes over the last ten years, many of which have resulted in lengthy and resource-intensive appeals. In addition to the *Global NAPs* appellate history discussed in footnote 3 above, see also, e.g., *Pacific Bell v. Pac-West, CPUC et al* 325 F.3d 1114 (9th Cir 2003); *Verizon v. Peevey et al. (CPUC Commissioners)*, 462 F.3d 1142 (9th Cir. 2006), also at 413 F.3d 1069 (district court decision vacated); *AT&T et al. v. Pacific Bell, CPUC, et al.*, 375 F.3d 894 (9th Cir. 2004); *Pacific Bell v. CPUC*, 2008 U.S. Dist. LEXIS 12924 (N.D. CA, 2008).

¹⁵ *Global NAPS Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 72 (1st Cir. 2006) (sometimes *Global NAPs III*). Although carrying out this dispute resolution service has sometimes stretched the CPUC's resources thin, the CPUC continues to shoulder its responsibilities under 47 U.S.C. § 252, and to resolve disputes relating to telecommunications utilities operating in its State.

highly contentious intercarrier disputes.¹⁶ The lack of clarity in many areas of intercarrier compensation continues to create opportunities for “regulatory arbitrage,” which in turn drives the litigation between carriers, and between carriers and state regulators.¹⁷

In this regard, the CPUC notes its own statement in the *Intercarrier Compensation* docket in 2006:

California believes that the current ICC scheme is no longer workable in today’s competitive telecommunications market. It skews the marketplace with non-cost based elements, and invites arbitrage. California encourages the FCC to take swift action on ICC issues as delay does not serve consumers.¹⁸

This continues to be California’s position.

¹⁶ As a District Court in New York found in another dispute between Global NAPs and Verizon:

There is no reason to wait for *Godot* or the adoption of a regulatory scheme for VoIP traffic by the FCC. The determination of disputed contractual obligations is well within the conventional experience of the district court ... neither Global nor Verizon have been shy in turning to the courts for resolution of disputes relating to their interconnection obligations and agreements.

Verizon New York v. Global NAPs, 463 F.Supp.2d 330, 342-43 (EDNY 2006). The parties in that case had originally taken their compensation dispute regarding VoIP traffic to the FCC, which “sent them packing.” *Id.* Although the District Court affirmed its own jurisdiction against a preemption challenge by Global NAPs (similar to Global NAPs’ arguments in California), and although the Court took up its task with good humor, the Court’s copious citation to interconnection cases makes plain how much judicial, administrative, and carrier time is expended in such dispute resolution. A Lexis search on March 11, 2008 for federal cases referencing 47 U.S.C. § 252, returned 405 results.

¹⁷ Compare, e.g., *Global NAPs v. Verizon*, *supra*, 444 F.3d at 75, quoting *ISP Remand Order*, 16 FCCR at 9153.

¹⁸ October 25, 2006 Comments of the People of the State of California and the California Public Utilities Commission in CC Docket No. 01-92, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, at p. 2.

IV. CONCLUSION

For the reasons stated herein, and as limited by the foregoing, the CPUC respectfully urges the Commission to carefully consider the position advanced in the Embarq Petition, as California believes that the problems described by Embarq are real, and urgent.

Respectfully submitted,

LIONEL B. WILSON
HELEN M. MICKIEWICZ
CHRISTOPHER P. WITTEMAN

By: /s/ CHRISTOPHER P. WITTEMAN

CHRISTOPHER P. WITTEMAN

505 Van Ness Avenue
San Francisco, CA 94102
Phone: (415) 355-5524
Fax: (415) 703-4465
Email: wit@cpuc.ca.gov

March 14, 2008

Attorneys for the People
Of The State Of California And The
California Public Utilities Commission

CERTIFICATE OF SERVICE

I, Christopher P. Witteman, hereby certify that on this 14th day of March, 2008 a true and correct copy of the forgoing **“COMMENTS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION AN THE PEOPLE OF THE STATE OF CALIFORNIA”** was mailed first class, postage prepaid to all known parties of record.

/s/ CHRISTOPHER P.

WITTEMAN

CHRISTOPHER P.

WITTEMAN